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Supreme Court, U.S.
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No. 04-

IN THE

Supreme Court of the United States

LOUISE E. LUALLEN,

Petitioner,

v.

GUILFORD HEALTH CARE CENTER, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Court of Appeals sanctioned a departure by the District Court from the accepted and usual course of judicial proceedings on a summary judgment motion in a Civil Rights case.

TABLE OF CONTENTS

	Page
Questions Presented	i
Table of Contents	ii
Table of Cited Authorities	iii
Table of Appendices	v
Opinions Below	1
Statement of Jurisdiction	1
Statutory Provision Involved	1
Statement of the Case	1
Reasons for Granting the Petition	3
Appellant's Title VII Claim and 42 U.S.C. § 1981	4
Plaintiff's Retaliation Claim	5
Conclusion	8

TABLE OF CITED AUTHORITIES

Page

Cases:

Anderson v. Liberty Lobby, Inc.,
477 U.S. 242, 106 S.Ct. 2505 (1986) 7

Bryant v. Bell Atl.Md., Inc.,
288 F.3d 124 (4th Cir. 2002) 4

Carter v. Ball,
33 F.3d 450 (4th Cir. 1994) 5, 6

Dugan v. Albemarle County Sch. Bd.,
293 F.3d 716 (4th Cir. 2002) 4

Joiner v. Walmart Stores, Inc.,
114 F. Supp. 2d 400 (W.D.N.C. 2000) 6

Lytle v. Household Manufacturing, Inc.,
494 U.S. 545 (1990) 7

McDonnell Douglas Corp. v. Green,
411 U.S. 792, 93 S. Ct. 1817 (1973) 4

Munday v. Waste Mgmt. of North Carolina, Inc.,
126 F.3d 239 (4th Cir. 1997), *cert. denied*,
522 U.S. 1116 (1998) 6

Stovall v. Smith,
962 F. Supp. 692 D. Md. (1996) 5

Cited Authorities

	Page
Thompson v. Potomac Elect. Power Co., 312 F.3d 645 (4th Cir. 2002)	4
Von Guten v. Maryland, 243 F.3d 869 (4th Cir. 2001)	5, 6
Williams v. Cerberonics, Inc., 871 F.2d 452 (4th Cir. 1989)	6-7
Statutes:	
28 U.S.C. § 1254(1)	1
42 U.S.C. § 1981	4
42 U.S.C. § 2000e	1
Rule:	
FRCP 56(c)	3

TABLE OF APPENDICES

Page

Appendix A — Opinion Of The United States Court Of Appeals For The Fourth Circuit Decided December 20, 2004 ..... 1a

Appendix B — Order Of The United States District Court For The Middle District Of North Carolina Dated And Filed June 14, 2004 ..... 4a

Appendix C — Memorandum Opinion And Order And Judgment Of The United States District Court For The Middle District Of North Carolina Dated December 18, 2003 ..... 7a

OPINIONS BELOW

The Order and Judgment of the Court of Appeals affirming the District Court is produced in Appendix A. The Orders of the District Court are reproduced in Appendices B and C.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit ("Court of Appeals") was entered on December 20, 2004.

The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(l).

STATUTORY PROVISION INVOLVED

The statute involved is set forth below.

Section 706(f)(1), Title VII, Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(f).

STATEMENT OF THE CASE

This action was instituted by plaintiff and five others on September 6, 2002, in the United States District Court for the Middle District of North Carolina. The case was resolved as to the other plaintiffs. This appeal is pursued by plaintiff Louise E. Luallen only. Plaintiff alleges that defendant discriminated against her because of race and retaliated against her because she engaged in protective activity.

During the month of March 2001, all plaintiffs were employees of defendant Guilford Health Care Center (GHCC).

In March 2001, plaintiffs Luallen and other African American nurses initiated a meeting with GHCC and expressed their concerns about a variety of issues of unfair treatment of African American nurses.

Among the concerns raised were (1) disrespect for the authority of African American supervisors by subordinate Caucasian nurses; (2) the condoning, encouragement and participation of management as such disrespect; (3) unequal treatment in the discipline of African American and Caucasian nurses; (4) disparity in the pay between African American and Caucasian nurses; (5) non-posting of vacant positions and allowing Caucasian managers to make unstructured promotion decisions that favored Caucasian nurses and discriminated against African American nurses; and (6) lack of support of African American nurses in supervisory positions with Caucasian subordinates.

Additional meetings followed on March 28, 2001, and April 27, 2001. Nothing was done to address the issues raised by plaintiff and other African American nurses. Plaintiff was discharged for not taking a call. White employees who refused calls were not discharged. Scott Hoops, a Caucasian employee, received a disciplinary action that states he was discharged for refusing a call. However, he remained employed.

In order to discharge plaintiff, defendant presented a laundry list of charges, which included insubordination, failure to follow procedures, conduct harmful to MFNC

(Medical Facilities of North Carolina), its residents, families, associates, visitors or others, refusing to take calls and abusive and offensive language. In contrast, all plaintiffs' evaluations from September 8, 1998, June 8, 1999, June 8, 2000 and June 8, 2001, were commendable and recognized plaintiff as a dependable, caring, compassionate, pleasant, honest and dedicated employee.

Plaintiff was terminated on August 20, 2001. The alleged discharge conduct took place following her initiative with other nurses in complaining about unfair treatment.

The District Court granted summary judgment in favor of defendant. Appendix B. The case was affirmed by the United States Court of Appeals for the Fourth Circuit.

REASONS FOR GRANTING THE PETITION

THE COURT HAS DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDING IN A MATTER OF EXCEPTIONAL IMPORTANCE TO THE AMERICAN WORKER.

The standard for summary judgment requires that judgment be granted for the movant if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." F.R.C.P. 56(c)

APPELLANT'S TITLE VII CLAIM AND 42 U.S.C. § 1981.

Plaintiff's showing sets forth facts demonstrating that prior to the initiative by African American nurses, all of her evaluations were commendable and that she had no performance problems. The alleged no-call violation, which triggered her termination, is not consistent with the Agency's policy. No one is terminated for the first refusal by rule. To further illustrate the point, it is noted that Scott Hoops (white) was not discharged. Moreover, Brenda Smith's progressive discipline further demonstrates that the first no-show, no-call does not result in termination.

Plaintiff's explanation for the no-call, no-show allegation is supported by the documents submitted.

In order to succeed on Title VII and § 1981 claims, plaintiff must produce evidence sufficient to support each element of a *prima facie* case. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 93 S. Ct. 1817, 1824 (1973); *Thompson v. Potomac Elect. Power Co.*, 312 F.3d 645 (4th Cir. 2002). Plaintiff must show that (1) she is a member of a protected class, (2) she suffered an adverse employment action, (3) her job performance was satisfactory, and (4) employees who were not members of the protected class were treated differently, or other circumstances giving rise to an inference of discrimination. *See Dugan v. Albemarle County Sch. Bd.*, 293 F.3d 716, 720-21 (4th Cir. 2002); *Bryant v. Bell Atl. Md.*, Inc., 288 F.3d 124, 133 (4th Cir. 2002). The Court concluded that plaintiff failed to show (a) she suffered an adverse employment action, (b) her job performance was satisfactory, and (c) circumstances giving rise to an inference of discrimination.

Plaintiff suffered adverse employment because she was discharged. Her evaluations over a three-year period are not consistent with the performance issues raised after her initiatives in calling attention to unfair treatment.

Plaintiff has set forth facts showing that white employees are treated differently with regards to unequal treatment in the discipline of African American and Caucasian nurses. Unfair discipline places an employee on the fast tract to termination, as happened in this case. The lack of support for African American supervisors lead to allegations of professional incompetence, resignation and discharge, as well as demotion. The series of acts that plaintiff complained of, taken as a whole, created a hostile environment for African American nurses who participated in calling to the attention of management unfair treatment. *See Von Guten v. Maryland*, 243 F.3d at 869 (4th Cir. 2001).

Plaintiffs' evidence cites instances of similar misconduct on the part of employees outside the protected class with which to compare their conduct, *Stovall v. Smith*, 962 F. Supp. 692 D. Md. (1996).

PLAINTIFF'S RETALIATION CLAIM.

In order to state a *prima facie* case of retaliation, plaintiff must show: (1) that she engaged in protected activity; (2) that it was followed by an adverse employment action; (3) that the protected conduct was a substantial or motivating factor in the adverse action. *Carter v. Ball*, 33 F.3d 450 (4th Cir. 1994).

The Fourth Circuit Court of Appeals recently has confirmed that, "[W]hat is necessary in all §2000e-3 retaliation cases is evidenced that the challenged discriminatory acts or harassment adversely effected [sic] 'the terms, conditions or benefits' of the plaintiff's employment." *Von Guten v. Maryland*, 243 F.3d 858, 865 (4th Cir. 2001) (quoting *Munday v. Waste Mgmt. of North America, Inc.*, 126 F.3d 239, 243 (4th Cir. 1997), *cert. denied*, 522 U.S. 1116 (1998). "Adverse employment action includes any retaliatory act or harassment if, but only if, that act or harassment results in an adverse effect on the "terms, conditions, or benefits' of employment." *Id.* at 866 (quoting *Munday*, 126 F.3d at 243)). In *Von Guten*, the Fourth Circuit joined the majority of sister circuits explicitly adopting this less-restrictive standard. *See Von Guten*, 243 F.3d at 866 n.4 (noting that the First, Ninth, Tenth and Eleventh Circuits also have "held that Title VII's protection against retaliatory discrimination extends to adverse acts that fall short of ultimate employment decisions." (Citing cases).

In this case, plaintiff received a series of mistreatments and was ultimately discharged. Plaintiff was engaging in protective activity.

Plaintiff's evidence shows a link between her activities initiated in March through June, and termination on August 20, 2001.

This indicates a temporal proximity which can weaken or even rebut the causation element, *Joiner v. Walmart Stores, Inc.*, 114 F. Supp. 2d 400, 410 (W.D.N.C. 2000), close temporal proximity can provide a sufficient inference of causation to satisfy the third prong of the *prima facie* case. *Carter v. Ball*, 33 F.3d 450, 460 (4th Cir. 1994); *Williams v.*

Cerberonics, Inc., 871 F.2d 452, 454 (4th Cir. 1989) (nothing that a causal connection had been found to exist when four months had passed between the protected activity and the adverse employment activity). In this case, the time period of over one month is enough to satisfy the causation element of the *prima facie* case. Therefore, appellant can establish a *prima facie* case of retaliation.

The appellee has cited performance and misconduct as reasons for termination. Appellant has presented evidence of different treatment and explanations which demonstrate that there are factual disputes.

A Court, in entertaining a motion for judgment as a matter of law, should review all of the evidence in the record. In doing so, however, the Court must draw all reasonable inferences in favor of the nominating party, and it may not make credibility determinations or weight evidence. *Lytle v. Household Manufacturing, Inc.*, 494 U.S. 545 (1990); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge. *Liberty Lobby, supra* at 255.

CONCLUSION

The case presents a question of exceptional importance – whether a litigant can be denied her day in court when factual issues of intent and motive are involved and controverted. The federal court must assure litigants that the right to a jury trial is protected. In this instance, a litigant is denied her day in court.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT DECIDED DECEMBER 20, 2004

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 04-1121

LOUISE E. LUALLEN,

Plaintiff - Appellant,

and

TINA C. NTUEN; MARIANA WILLIAMS; BRENDA K. SMITH; VELVET GARRIQUES; LINDA GLASGOW,

Plaintiffs,

versus

GUILFORD HEALTH CARE CENTER; PARENT CORPORATION MEDICAL FACILITIES OF NORTH CAROLINA, INCORPORATED,

Defendants - Appellees.

Appendix A

No. 04-1927

LOUISE E. LUALLEN,

Plaintiff - Appellant,

and

TINA C. NTUEN; MARIANA WILLIAMS; BRENDA K. SMITH; VELVET GARRIQUES; LINDA GLASGOW,

Plaintiffs,

versus

GUILFORD HEALTH CARE CENTER; PARENT CORPORATION MEDICAL FACILITIES OF NORTH CAROLINA, INCORPORATED,

Defendants - Appellees.

Appeals from the United States District Court for the Middle District of North Carolina, at Durham. William L. Osteen, District Judge. (CA-02-738-1)

Submitted: November 24, 2004

Decided: December 20, 2004

Before TRAXLER and SHEDD, Circuit Judges, and HAMILTON, Senior Circuit Judge.

Affirmed by unpublished per curiam opinion.

Appendix A

PER CURIAM:

Louise E. Luallen appeals the district court's order denying relief on her discrimination claims based on Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e (2000), and denying her motion filed under Fed. R. Civ. P. 60(b). We have reviewed the record and find no reversible error. Accordingly, we affirm the denial of Luallen's Title VII claims on the reasoning of the district court. *See Luallen v. Guilford Health Care Ctr.*, No. CA-02-738-1 (M.D.N.C. Dec. 19, 2003; June 15, 2004). Moreover, we conclude that Luallen waived her right to appeal the district court's denial of her Rule 60(b) motion by failing to comply with Fed. R. App. P. 28(a)(9)(A). We grant Appellees' motions to submit these appeals on the briefs and dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF NORTH CAROLINA DATED AND FILED JUNE 14, 2004

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

1:02CV00738

LOUISE E. LUALLEN, TINA C. NTUEN; MARIANA WILLIAMS; BRENDA K. SMITH; VELVET GARRIQUES; LINDA GLASGOW,

Plaintiffs,

v.

GUILFORD HEALTH CARE CENTER; PARENT CORPORATION MEDICAL FACILITIES OF NORTH CAROLINA, INCORPORATED,

Defendants.

ORDER

On June 19, 2003, the court issued a motion schedule in this case, requiring that summary judgment motions be filed no later than September 5, 2003, with responses due by September 15, 2003. On September 16, 2003, plaintiffs moved for an extension of time to respond to Defendants' motion for summary judgment, which was timely filed on September 5, 2003. Plaintiffs' motion for extension of time was denied and Plaintiffs did not file their response until October 1 , 2003. Defendants moved to strike plaintiffs' response as untimely; Plaintiffs did

not respond to that motion. On December 18, 2003, the court, finding that Plaintiffs had not shown excusable neglect, granted the motion to strike and also granted Defendants' motion for summary judgment. *See Luallen v. Guilford Health Care Ctr.*, No. 1:02CV00738, 2003 WL 23094916, at *3 (M.D.N.C. Dec. 18, 2003).

Plaintiff Louise F. Luallen now seeks to vacate this court's order and judgment, arguing that, pursuant to Pule 60 (b) of the Federal Rules of Civil Procedure, justice requires that the judgment be set aside because the delay in responding to Defendants' motion for summary judgment was not attributable to her. Plaintiffs' counsel concurs that the late filing was due solely to his own neglect., which resulted from his increased workload due to his office-mate's suffering a stroke in February 2003, his difficulty scheduling meetings around Plaintiffs' work hours, and his high volume of pro bono service. (Murphy Aff. ¶¶ 1-4, 6.) Luallen argues that she should not be held accountable for her attorney's procrastination, and, as such, her claims should be considered on their merits.

This argument fails, however, to acknowledge that clients are bound by the neglectful acts of their attorneys. *See Pioneer Inv. Servs. Co. v. Brunswick Assocs. L.P.*, 507 U.S. 380, 396-97, 113 S. Ct. 1489, 1499 (1993). Further, the conditions cited by Plaintiffs' counsel simply do not warrant granting Luallen's Rule 60(b) motion, which is an "extraordinary" remedy, "only to be invoked upon a showing of exceptional circumstances." *McLawhorn v. John W. Daniel & Co.*, 924 F.2d 535, 538 (4th Cir. 1991) (per curiam). Plaintiffs' counsel agreed to the motion schedule in June 2003, well after he assumed additional work on behalf of his office-mate, and with full knowledge of his clients' work hours and his own pro bono commitments.

Appendix B

Luallen's argument also fails to acknowledge that, despite her attorney's late filing, the court declined to summarily grant Defendants' motion for summary judgment as uncontested and instead considered Luallen's claims on their merits.[1] The court also reviewed the evidence filed in support of Plaintiffs' late response and concluded that "[t]he vast majority of Plaintiffs' evidence consists of their own self-serving allegations and conclusions." *Luallen*, 2003 WL 23094916, at *7; *see also id.* at *9 nn.4-5, *11 n.11. Since the court reviewed Plaintiffs' evidence and determined that their Case, including Luallen's claims, was without merit, it now declines to vacate its order and judgment striking Plaintiffs' response and granting summary judgment in Defendants' favor.

IT IS ORDERED that plaintiff Luallen's Motion to vacate [43] this court's order and judgment of December 18, 2003, is denied.

This the 14 day of June 2004.

s/ [illegible]
United States District Judge

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1. "Since Plaintiffs failed to file their response [to the summary judgment motion] within the time required, the motion will be considered uncontested." *Luallen*, 2003 WL 23099916, at *3. "Although an uncontested motion 'ordinarily will be granted without further notice,' the court declines to summarily grant Defendants' motion for summary judgment and will proceed to consider the merits." *Id.* at *3 n.3 (quoting LR7.3(k)).

APPENDIX C — MEMORANDUM OPINION AND ORDER AND JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF NORTH CAROLINA DATED DECEMBER 18, 2003

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT
OF NORTH CAROLINA

1:02CV00738

LOUISE E. LUALLEN, TINA C. NTUEN; MARIANA WILLIAMS; BRENDA K. SMITH; VELVET GARRIQUES; LINDA GLASGOW,

Plaintiffs,

v.

GUILFORD HEALTH CARE CENTER; PARENT CORPORATION MEDICAL FACILITIES OF NORTH CAROLINA, INCORPORATED,

Defendants.

MEMORANDUM OPINION

OSTEEN, District Judge

Louise E. Luallen, Tina C. Ntuen, Velvet Garriques, Mariana Williams, Linda Glasgow, and Brenda K. Smith have filed suit against Defendants Guilford Health Care Center and Medical Facilities of North Carolina, Inc.[1] claiming

1. Defendants note that Plaintiffs improperly identify Guilford Health Care Center as "Guilford Health Care" and Medical Facilities (Cont'd)

violations of 42 U.S.C. § 1981 ("§ 1981"), Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(f) ("Title VII"), and Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d ("Title VI"). Defendants reached a settlement with Glasgow and Smith, and their claims were voluntarily dismissed with prejudice on December 15, 2003. With regard to Luallen, Ntuen, Garriques, and Williams (collectively, "Plaintiffs"), this matter is now before the court on Defendants' motion for summary judgment as to all of Plaintiffs' claims.

I. BACKGROUND

On various dates between August 1996 and August 2000, Plaintiffs were individually hired as nurses by Guilford Health Care Center ("GHCC"). Plaintiffs occupied various positions and shifts; all were either registered or licensed practical nurses and some held supervisory positions. During their time at GHCC, Plaintiffs, each of whom is black, came to feel that they were being discriminated against on the basis of their race. In March 2001, Luallen approached GHCC Administrator Laura Lucas with these concerns.

Subsequently, several black nurses, including but not limited to Plaintiffs, met with Ms. Lucas to discuss alleged discrimination at GHCC. Their complaints included concerns

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(Cont'd)

of North Carolina, Inc. as "Parent Corporation Medical Facilities of North Carolina, Incorporated." For purposes of this motion, the court will assume that Defendants are correct in their assertion that the proper names of Defendants are Guilford Health Care Center and Medical Facilities of North Carolina, Inc. and will refer to them as such.

that job openings were not advertised in-house, some supervisors were rude, breaks were disproportionate, work duties were unequal, and discipline was handled disparately. A second meeting, again consisting solely of black employees and Ms. Lucas, was held in April 2001. GHCC claims to have addressed at least some of the concerns raised at these meetings.

At various times between August 20 and December 27, 2001, Luallen, Ntuen, and Garriques were fired by GHCC. Williams resigned her position on July 23, 2001.

All four Plaintiffs now allege that Defendants unlawfully discriminated against them on the basis of race in violation of § 1981 and Title VI; Luallen and Ntuen allege discrimination in violation of Title VII. The three Plaintiffs who were fired also allege discriminatory retaliation in violation of § 1981 and Title VI; of these three, only Luallen and Ntuen allege retaliation in violation of Title VII. The fourth Plaintiff, Williams, alleges that her resignation was a constructive discharge in violation of § 1981 and Title VI. All of these claims were included in a single complaint, filed September 6, 2002.

Appendix C

On June 19, 2003, the court issued a motion schedule requiring motions for summary judgment to be filed no later than September 5, 2003, with responses due by September 15, 2003. The order expressly provided "[t]his schedule will not be further modified except for good cause shown." On September 16, 2003, Plaintiffs moved for an extension of time to respond to Defendants' motion for summary judgment, which had been timely filed on September 5, 2003. The court denied this motion; Plaintiffs filed their response on October 1, 2003, more than two weeks late.

II. ANALYSIS

A. *Motion to Strike*

Defendants have moved to strike Plaintiffs' response to Defendants' motion for summary judgment on the grounds that the response was untimely. Defendants charge that Plaintiffs have not shown good cause for their late filing and, as such, the response should be stricken.

Since Plaintiffs moved for an extension of time after their filing deadline passed, their response can only be accepted if they demonstrate that their tardiness resulted from "excusable neglect." *See* Fed. R. Civ. P. 6(b)(2); *Lujan v. National Wildlife Fed'n*, 497 U.S. 871, 897, 110 S. Ct. 3177, 3193 (1990); LR7.3(k). The Supreme Court has set forth factors to consider in determining whether excusable neglect has caused a delay in filing. *See Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 395, 113 S. Ct. 1489, 1498 (1993). These factors include "the danger of prejudice to the [non-movant], the length of the delay and

its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith." *Id.* Although the Court's decision considered excusable neglect as the phrase is used by Bankruptcy Rule 9006(b)(1), the Fourth Circuit has said that the approach taken in *Pioneer* has "general application to the consideration of excusable neglect." *Skinner v. First Union Nat'l Bank*, No. 98-1627, 1999 WL 261944, at *2 (4th Cir. May 3, 1999).

As noted by Defendants, the delay in this case causes their motion for summary judgment to be considered very near to the date of trial, requiring that they begin trial preparation before their dispositive motion is decided. Additionally, this court's consideration of the motion for summary judgment was delayed not only by Plaintiffs' late filing, but also by the consideration of this meritorious motion to strike. Plaintiffs' delay has thus prejudiced Defendants and impacted the judicial proceedings.

As to the third and fourth factors, the reason for the delay and whether the movant acted in good faith, Plaintiffs provide only limited insight. In their motion for an extension of time, Plaintiffs stated, "Counsel is in need of additional time to respond. There are six plaintiffs and a large volume of material to consider. Counsel is engaged in other matters and need[s] the additional time to respond." (Pls.' Mot. Enlarge. Time ¶ 3.) Since Plaintiffs failed to respond to Defendants' motion to strike, the court is without further explanation that might support a finding of excusable neglect. This lone statement by Plaintiffs as to the cause of the delay merely indicates a lack of preparedness. While this reason may

represent neglect, it is certainly not excusable and does not exhibit good faith.

Finally, although a delay of two weeks is not egregious, Plaintiffs' failure to timely respond to the motion for summary judgment and complete failure to respond to the motion to strike continue a pattern of general neglect with regard to discovery deadlines and production.[2] Plaintiffs failed to timely provide Defendants' initial discovery requests and repeatedly failed to rectify inadequate discovery responses, culminating in this court's grant of a motion to compel on June 17, 2003. (Defs.' Mem. Supp. Mot. Compel at 2, Exs. G-J.)

Plaintiffs also expressly agreed to the summary judgment motion schedule set by this court on June 19, 2003. This schedule required Plaintiffs to file their response to any motion for summary judgment by September 15, 2003. The court stated that the schedule would not be further modified absent good cause shown and expressly noted that it would "not accept as a showing of 'good cause' that Plaintiffs have persisted in refusing to turn over discovery." Plaintiffs failed to comply with the schedule, did not request an extension of time until after the deadline for filing had passed, and, when their request was denied, did not file their response until October 1, 2003.

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2. A party's chronic failure to adhere to deadlines is one factor a court may consider in determining whether excusable neglect explains a failure to file. *Kirby v. General Elec. Co.*, 210 F.R.D. 180, 193 (W.D.N.C.2000).

Since Plaintiffs have not shown that any of the factors expressed in *Pioneer* weigh in their favor, they have failed to show that their delay resulted from excusable neglect. As such, the court will grant Defendants' motion to strike Plaintiffs' response to the motion for summary judgment. Since Plaintiffs failed to file their response within the time required, the motion will be considered uncontested. LR7.3(k).[3]

B. *Defendants' Motion for Summary Judgment*

1. Standard of Review

Summary judgment is appropriate where an examination of the pleadings, affidavits, and other proper discovery materials before the court demonstrates that there is no genuine issue of material fact, thus entitling the moving party to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 106 S. Ct. 2548, 2552 (1986). If the moving party has met that burden, the nonmoving party must then persuade the court that a genuine issue does remain for trial.

> When the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts. In the language of the Rule,

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3. Although an uncontested motion "ordinarily will be granted without further notice," the court declines to summarily grant Defendants' motion for summary judgment and will proceed to consider the merits. LR7.3(k).

> the nonmoving party must come forward with "specific facts showing that there is a *genuine issue for trial.*"

Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586-87, 106 S. Ct. 1348, 1356 (1986) (citations omitted) (quoting Fed. R. Civ. P. 56(e)). However, there must be more than just a factual dispute; the fact in question must be material and the dispute must be genuine. *See* Fed. R. Civ. P. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 2510 (1986). Although the court must view the facts in the light most favorable to the nonmovant, *see Anderson*, 477 U.S. at 255, 106 S. Ct. at 2513, "bare allegations unsupported by legally competent evidence do not give rise to a genuine dispute of material fact." *Solis v. Prince George's County*, 153 F. Supp. 2d 793, 807 (D. Md. 2001). Summary judgment should be granted unless a reasonable jury could return a verdict in favor of the nonmovant on the evidence presented. *McLean v. Patten Cmtys., Inc.*, 332 F.3d 714, 719 (4th Cir. 2003) (citing *Anderson*, 477 U.S. at 247-48, 106 S. Ct. at 2509-10).

2. Claims Against Defendant Medical Facilities of North Carolina

Plaintiffs have named both their employer, GHCC, and Medical Facilities of North Carolina, Inc. ("MFNC") as defendants. Plaintiffs allege that MFNC is the parent company of GHCC and a proper party to this action. Defendants dispute this contention, claiming that MFNC merely provides GHCC with various management services, including payroll and billing functions and various consulting

services. Defendants state that MFNC is not the parent company of and owns no ownership interest in GHCC. Defendants have provided an affidavit from Ron Covington, vice president of MFNC, confirming these assertions. (Covington Aff. ¶ ¶ 2-3). Since Plaintiffs do not dispute Defendants' contentions,[4] the court will grant summary judgment in favor of MFNC on all Plaintiffs' claims.

3. Plaintiffs' Claims under § 1981

Plaintiffs' first cause of action is asserted pursuant to § 1981. Although this statute expressly guarantees only an equal right to make and enforce contracts, courts have held that it also provides a basis for at-will employees to claim employment discrimination. *See* 42 U.S.C. § 1981; *Spriggs v. Diamond Auto Glass*, 165 F.3d 1015, 1018-19 (4th Cir. 1999) (holding that an at-will employment relationship may serve as a predicate contract for a § 1981 claim of employment discrimination). As such, § 1981 provides Plaintiffs with a cause of action to assert that their former employer, GHCC, discriminated or retaliated against them on the basis of race.

When considering discrimination or retaliation claims asserted pursuant to § 1981, courts should apply the analysis employed in Title VII claims. *Thompson v. Potomac Elec. Power Co.*, 312 F.3d 645, 649 n.1 (4th Cir. 2002); *Bryant v. Bell Atl. Md., Inc.*, 288 F.3d 124, 133 n.7 (4th Cir. 2002)

4. Even though Plaintiffs' response has been stricken, the court has reviewed the response and accompanying evidence and finds that neither source offered any fact or argument to dispute Defendants' assertion that MFNC is not a proper party to this suit.

(citing *Gairola v. Commonwealth of Va. Dep't of Gen. Servs.*, 753 F.2d 1281, 1285-86 (4th Cir. 1985)). Under the long established Title VII burden-shifting scheme, absent direct evidence of discrimination, Plaintiffs are required to show a prima facie case of discrimination or retaliation in order to defeat a motion for summary judgment. *Bryant*, 288 F.3d at 133. If Plaintiffs are able to show a prima facie case, the burden is on Defendants to demonstrate a legitimate, non-discriminatory reason for the adverse treatment. *Id.*; *see also McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-03, 93 S. Ct. 1817, 1824 (1973). If Defendants make this showing, Plaintiffs' claims will only survive summary judgment if Plaintiffs demonstrate that the reason articulated by Defendants is merely pretextual. *Bryant*, 288 F.3d at 133.

By failing to respond to Defendants' motion for summary judgment, Plaintiffs have also failed to produce any direct evidence of discrimination.[5] As such, the court will consider only whether Plaintiffs have established a prima facie case with regard to each of their allegations, and whether Defendants have articulated a legitimate, rather than pretextual, reason for any disparate treatment.

a. Discrimination Claims

In order to succeed on their § 1981 claims, Plaintiffs must produce evidence sufficient to support each element of

5. As mentioned above, the court reviewed Plaintiffs' response and accompanying evidence. In their response, Plaintiffs did not assert that they had produced any direct evidence of discrimination. The court's own examination of Plaintiffs' evidence also failed to reveal any direct evidence of discrimination.

a prima facie case. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 93 S. Ct. 1817, 1824 (1973); *Thompson v. Potomac Elec. Power Co.*, 312 F.3d 645, 649 (4th Cir. 2002). Plaintiffs must show that (1) they are members of a protected class, (2) they suffered an adverse employment action, (3) their job performance was satisfactory, and (4) employees who were not members of the protected class were treated differently, or other circumstances giving rise to an inference of discrimination. *See Dugan v. Albemarle County Sch. Bd.*, 293 F.3d 716, 720-21 (4th Cir. 2002); *Bryant v. Bell Atl. Md., Inc.*, 288 F.3d 124, 133 (4th Cir. 2002).

To establish their prima facie case, Plaintiffs have shown that they are members of a protected class and, by way of their depositions, have alleged some treatment that might constitute an adverse employment action. *See* Defs.' Notice of Filing, Exs. J, K, N, O. For example, Plaintiff Luallen claims that black nurses were not promoted, were granted fewer and shorter breaks, and received less compensation. (Defs.' Notice of Filing, Ex. J at 36-37, 49, 88.) Plaintiff Ntuen asserts that she was demoted, denied a plaque she earned, and was not invited out to lunch with other nurses. (Defs.' Notice of Filing, Ex. N at 56, 108, 130, 138.) The remaining Plaintiffs allege similar discriminatory acts, including unequal work requirements and disparate disciplinary procedures. (Defs.' Notice of Filing, Exs. J at 47, O at 36-37, 102.)

In order to succeed at trial, Plaintiffs would have to demonstrate that at least one of the incidents alleged rose to the level of an adverse employment action, creating an inference of unlawful discrimination. However, many of the

incidents Plaintiffs describe do not rise to the level of an adverse employment action as a matter of law. Adverse employment actions include only those acts that negatively impact the "terms, conditions, or benefits" of Plaintiffs' employment. *Von Gunten v. Maryland*, 243 F.3d 858, 866 (4th Cir. 2001). Claims that Ntuen was denied a plaque after completing a training program and that some Plaintiffs were not invited to social activities cannot be considered adverse employment actions because the terms, conditions, and benefits of Plaintiffs' employment were not affected. *See, e.g., id.* at 869 (noting that disparate application of workplace policies and minor workplace annoyances do not constitute adverse employment actions); *Mangum v. Postmaster Gen. U.S. Postal Serv.*, No. 1:02CV00561, 2003 WL 22741191, at *4 n.4 (M.D.N.C. Nov. 14, 2003) (quoting *Montandon v. Farmland Indus., Inc.*, 116 F.3d 355, 359 (8th Cir. 1997)) ("[N]ot everything that makes an employee unhappy is an actionable adverse action.").

As to the remaining allegedly discriminatory acts, whether or not they rise to the level of adverse employment actions, Plaintiffs have failed to provide any evidence suggesting they were racially motivated. Plaintiffs' claim of disparate work requirements, for example, rests mainly on their belief that certain nurses did not handle medical carts, while others consistently had to do so. There is no evidence from which to conclude that this duty was imposed on the basis of race. In fact, both black and white employees of GHCC agree that the duty was handled by nurses of either race in varying positions of authority. (Matos Aff. ¶ 23; Clapp Aff. ¶ 6; Walker Aff. ¶ 6; Roberson Aff. ¶ 9.) This fact supports the stated policy that the medical carts can be handled by virtually any nurse and are assigned on an as-needed basis. (Lucas Aff. ¶ 30; Patrum Aff. ¶ 22; Matos Aff. ¶ 23.)

Appendix C

As to the allegations regarding unequal promotion opportunities, Plaintiffs collectively were able to recall four instances in which promotions were available but not posted. Of these, two went to black employees, one of which was Plaintiff Ntuen. (Defs.' Notice of Filing, Exs. N at 108-09, O at 21- 23.) The evidence also does not support Plaintiffs' contentions that they were excluded from social gatherings or denied extended breaks on racial grounds. At least one black supervisor, Alfreda Matos, was a part of the "clique" engaged in these activities.[6] (Defs.' Notice of Filing, Ex. M at 65; Osborne Aff. ¶ 20; Matos Aff. ¶ 26.) Finally, there is no evidence to suggest that GHCC failed to support its black supervisors, specifically Plaintiff Williams. Other black supervisors state that they were promoted regularly and did not feel discriminated against. (Matos Aff. ¶ ¶ 2, 26; Clapp Aff. ¶ 6.) Additionally, Williams concedes that GHCC "backed [her] up" on at least two occasions when she had difficulty with two employees. (Defs.' Notice of Filing, Ex. K at 114, 118.)

Plaintiffs have not established that they suffered adverse employment actions and have produced no legally competent evidence to support their claims to the contrary. Further, Plaintiffs have generally failed to assert the remaining elements of their prima facie case, namely that they performed their jobs satisfactorily and were treated differently than white employees.

Plaintiffs certainly have not shown that their job performance was satisfactory. To the contrary, they make no effort to deny or explain numerous disciplinary write-ups

6. In fact, at least one GHCC employee has stated that this clique was established on the basis of whether or not individuals smoked, not on the basis of race. (Osborne Aff. ¶ 20.)

and poor work evaluations offered as evidence by Defendants. Plaintiffs' delinquencies included: use of offensive language, rudeness, and fighting with co-workers (Luallen, Ntuen, Garriques, Williams); failure to follow medical procedure, falsifying records, and other mistakes (Luallen, Ntuen, Garriques); failure to take call and other avoidance of duties (Luallen, Ntuen, Williams); failure to complete shifts, tardiness, and unexcused absences (Ntuen, Garriques); excessive use of phones (Ntuen); and failure to participate in drug testing and other in-house investigations (Garriques). (Lucas Aff. ¶ 15, Exs. A, B; Patrum Aff. Exs. A, B, H-K; Osborne Aff. Exs. A-G; Matos Aff. ¶ ¶ 3-13, 16, 17, Ex. C; Defs.' Notice of Filing, Ex. K at 190.)

Plaintiffs have also failed to show that other employees who were not members of a protected class were treated differently or, in the alternative, that their jobs were filled by individuals who were not members of a protected class. Instead, the evidence shows that white employees were equally disciplined, and in some cases terminated, for similar conduct. (Lucas Aff. ¶ 33; Patrum Aff. ¶ 36, Ex. I; Osborne Aff. ¶ ¶ 5, 9; Matos Aff. ¶ 10, Ex. I.) The evidence also shows that, after their positions were vacated, most of Plaintiffs' positions (Luallen, Ntuen, Williams) were filled by black applicants. (Defs.' Mem. Support Mot. Summ. J. at 13, 15; Patrum Aff. ¶ 37; Matos Aff. ¶ 2; Defs.' Notice of Filing, Ex. P at 3.)

In sum, Plaintiffs have failed to produce evidence that would support three of the four required elements of a prima facie discrimination case. Even if Plaintiffs had successfully carried their burden in this regard, Defendants have refuted

their claims by showing legitimate, nondiscriminatory reasons for each of the alleged adverse employment actions. *See McDonnell Douglas*, 411 U.S. at 802-03, 93 S. Ct. at 1824; *Bryant*, 288 F.3d at 133. For example, Plaintiff Ntuen did not receive a plaque upon completing her training program because these plaques were only available to directors of nursing; Ntuen was an assistant director of nursing. (Patrum Aff. ¶ 11.) Further, when Ntuen was demoted, it was the result of her unsatisfactory performance, as discussed above. As to Plaintiffs' claims of disparate pay, two white nurses received bonuses, not because of their race, but because they always worked their shifts alone, handling duties that would ordinarily have been completed by three nurses. (Lucas Aff. ¶ 26; Roberson Aff. ¶ 11.) Other nurses on short-staffed shifts were not offered similar bonuses because they volunteered for this duty and did not have it full time. (Lucas Aff. ¶ 26.)

Defendants have sufficiently demonstrated legitimate, nondiscriminatory reasons for each of these actions. *Causey v. Balog*, 162 F.3d 795, 800 (4th Cir. 1998) (noting that a defendant's burden on this point is only one of production, not persuasion). This showing would successfully rebut a prima facie case of discrimination had Plaintiffs succeeded in producing one. The evidentiary burden is then returned to Plaintiffs who must show that the legitimate reasons articulated by Defendants were merely pretextual. *Bryant*, 288 F.3d at 133; *Cook v. CSX Transp. Corp.*, 988 F.2d 507, 511 (4th Cir. 1993).

Plaintiffs have failed to carry that burden. The vast majority of Plaintiffs' evidence consists of their own self-

serving allegations and conclusions delivered through their own filings, which this court has stricken, and depositions taken by Defendants. However, mere speculation as to an employer's discriminatory motive is insufficient to survive a summary judgment motion. *See Frazier v. Bentsen*, No. 95-1290, 1996 WL 445090, at *5 (4th Cir. Aug. 8, 1996); *Beale v. Hardy*, 769 F.2d 213, 214 (4th Cir. 1985).

Plaintiffs have failed to meet their evidentiary burdens in all aspects of their discrimination claims. Since Plaintiffs did not produce evidence to support a prima facie discrimination case and did not refute Defendants' legitimate, non-discriminatory reasons for the allegedly adverse actions taken, the court concludes that there are no genuine issues of material fact with regard to these claims. Therefore, the court will grant Defendants' motion for summary judgment as to Plaintiffs' discrimination claims under § 1981.

b. Retaliation Claims

Three Plaintiffs allege that they were fired in retaliation for their participation in two nurses' meetings with GHCC's administration, during which they voiced their concerns about discrimination at GHCC.[7] Some, if not all, of the adverse treatment described above was discussed at these meetings.

To succeed on their § 1981 retaliation claims, Plaintiffs must show that (1) they engaged in a protected activity,

7. The meetings with administrators occurred on March 28 and April 27, 2001; each of the Plaintiffs was fired between four and eight months later (Luallen was terminated on August 20, 2001, Ntuen on November 11, 2001, and Garriques on December 27, 2001).

(2) they suffered an adverse employment action, and (3) GHCC took the adverse action because of the protected activity. *See Bryant v. Aiken Reg'l Med. Ctrs. Inc.*, 333 F.3d 536, 543 (4th Cir. 2003); *Spriggs v. Diamond Auto Glass*, 242 F.3d 179, 190 (4th Cir. 2001). As with discrimination claims, assuming Plaintiffs show a prima facie case, Defendants can still succeed on their motion for summary judgment by showing a legitimate, non-discriminatory reason for the adverse employment action. *See Aiken Reg'l*, 333 F.3d at 543; *Spriggs*, 242 F.3d at 190.

Participation in an organized meeting with administration for the purpose of registering complaints regarding workplace discrimination is a protected activity. *See Aiken Reg'l*, 333 F.3d at 543-44 (finding that alerting supervisors to discriminatory practices is a protected activity); *Thompson v. Potomac Elec. Power Co.*, 312 F.3d 645, 650 (4th Cir. 2002) (finding that filing internal discrimination complaints is a protected activity). Plaintiffs have demonstrated that they engaged in two such meetings and were later fired. The question is then one of causation; to establish their prima facie case, Plaintiffs must show that they were terminated because they engaged in a protected activity.

Plaintiffs cannot make that required showing. As discussed above, each Plaintiff engaged in multiple infractions of GHCC policy, any of which could have justified their termination. Although Plaintiffs claim that white employees were not fired for similar transgressions, the white employees Plaintiffs cite as examples have not been shown to engage in the pattern of misbehavior characteristic of each Plaintiff.

For example, Plaintiff Luallen claims she was fired when she refused to "take call," a practice by which on-call nurses may be required to come in and work. Luallen claims that it is not GHCC's policy to fire a nurse after one refusal to take call. She notes that a particular white nurse refusing to take call was not fired. However, Plaintiffs have not produced any evidence to show that this white nurse engaged in other improper behavior that would justify her firing. Conversely, Defendants have shown that, in addition to failing to take call, Luallen was fired for "insubordination, open defiance or disregard of a supervisor's instruction ... failure to follow procedures of critical importance to [her] job ... conduct which ... is harmful to [GHCC], its residents, families, associates, visitors, vendors or others ... abusive, disruptive or offensive language or actions ... [and] failure to exhibit customer service." (Patrum Aff. Ex. B.)

Likewise, Ntuen was fired for withholding information, failing to follow "procedures of critical importance to [her] job," and "knowingly providing false or incomplete information to [her] supervisor, the facility administrator or corporate staff." (Patrum Aff. Ex. F.) Garriques was terminated after failing to perform the requirements of her job, receiving two prior disciplinary write-ups in the previous year, and failing to "cooperate fully with the investigation conducted by the ... authorized staff." (Osborne Aff. Exs. G, H.) Each of these Plaintiffs committed multiple other infractions and received numerous disciplinary write-ups before committing the offenses that were specifically cited and ultimately responsible for their firing. *See* Lucas Aff. ¶¶ 10-12, Exs. A, B; Patrum Aff. ¶¶ 3-10, 11-16, Exs. A, H, J; Matos Aff. ¶¶ 3-13, Exs. A-D, G, H; Roberson Aff. ¶¶ 3-8.

In short, Plaintiffs have failed to show that they were fired because they engaged in a protected activity. Further, Defendants have shown numerous legitimate, nondiscriminatory reasons for firing each Plaintiff. Plaintiffs have not shown these reasons to be pretextual.[8] As such, Defendants are entitled to summary judgment on Plaintiffs' claims of retaliation under § 1981.

c. Constructive Discharge

Plaintiff Williams voluntarily resigned from her position and so, unlike the other three Plaintiffs, does not allege retaliatory firing. Instead, she appears to assert, albeit indirectly, a constructive discharge claim.

To succeed on a constructive discharge claim, Williams must show that GHCC deliberately made her working conditions intolerable to compel her resignation. *See Amirmokri v. Baltimore Gas & Elec. Co.*, 60 F.3d 1126, 1132 (4th Cir. 1995); *Martin v. Cavalier Hotel Corp.*, 48 F.3d 1343, 1353-54 (4th Cir. 1995). Williams must then "prove two elements: (1) the 'deliberateness of [GHCC's] actions' and (2) the 'intolerability of the working conditions.' " *Amirmokri*, 60 F.3d at 1132 (quoting *Martin*, 48 F.3d at 1354).

To establish that her working conditions were intolerable, Williams charges that two white employees under her

8. Plaintiffs' claims of retaliation are further refuted since at least two black nurses, Lenora Clapp and Margaret Williams, attended the meetings with Ms. Lucas but were not fired. (Clapp Aff. ¶ 6; Defs.' Notice of Filing, Ex. K at 235.)

supervision were consistently belligerent and refused to follow her directions. (Defs .' Notice of Filing, Ex. K at 50.) Although Williams consulted with her superiors and disciplined her two white subordinates, they persisted in their behavior. Williams claims that GHCC supervisors undermined her authority by generally failing to help her control these employees. Specifically, Williams notes that on at least one occasion, another supervisor directly overruled Williams's decision not to let them leave their shifts early.

While it may be that Williams found these working conditions intolerable,[9] she has not produced any evidence demonstrating that fact to the court. Even if she had made such a showing, Williams has failed to show that GHCC's administration purposefully undermined her authority in a deliberate attempt to force her resignation. As evidence of a racially-based motive, Williams relies solely on her own allegations and general statements by her fellow Plaintiffs. These self-serving assertions are insufficient to create a genuine issue of material fact and thus prevent the denial of summary judgment Plaintiffs now urge. *See Frazier v. Bentsen*, No. 95-1290, 1996 WL 445090, at *5 (4th Cir. Aug. 8, 1996); *Beale v. Hardy*, 769 F.2d 213, 214 (4th Cir. 1985); *Barwick v. Celotex Corp.*, 736 F.2d 946, 963 (4th Cir. 1984).

In fact, it is not even clear that a lack of support for Williams existed at GHCC. As was discussed herein,

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9. In response to Defendants' interrogatory regarding her damages, Williams notes, "Emotional pains and mental anguish from the administration of GHCC due to the color of my skin was too severe and cannot be compared in monetary amount. $20,000." (Pls.' Notice of Filing, Ex. 3 at 5.)

Williams concedes that GHCC "backed [her] up" on at least two occasions when she was confronted by the two difficult white employees. (Defs.' Notice of Filing, Ex. K at 114, 118.) Williams also admits that when she had problems with a white supervisor who allegedly spread rumors about her, a white administrator "stopped it immediately." (Defs.' Notice of Filing, Ex. K at 220.) Further, the Director of Nursing stated that she was "extremely surprised" when Williams announced her resignation and "repeatedly asked her if she really wanted to and told her that although there were issues with her supervisory style that she needed to work on, she really didn't need to [resign] ." (Patrum Aff. ¶ 33.)

Additionally, GHCC's own employment records show no sign of discriminatory policies toward management. Since 1999, between 77 and 83 percent of GHCC's total staff consisted of black employees. (*Id.* ¶ 4.) In 2000, the year Williams began working at GHCC, 43 percent of the facility's management employees were black. (*Id.*) That number rose to 55 percent in 2001, the year Williams resigned. (*Id.*) These figures entirely undermine Williams's claim that black supervisors were unsupported by the administration and that GHCC deliberately caused her to resign due to her race.

Williams has failed to show that GHCC deliberately created an intolerable work environment in order to force her resignation. Since Williams has not produced any evidence to suggest that she was the victim of racially motivated constructive discharge, the court will grant Defendants' motion for summary judgment on this claim.

4. Plaintiffs' Claims under Title VII

Only Plaintiffs Luallen and Ntuen allege discriminatory treatment and retaliatory discharge in violation of Title VII. Although this statute supports causes of action separate from those alleged under § 1981, the prima facie case requirements and subsequent evidentiary burdens are identical.[10] *See Thompson v. Potomac Elec. Power Co.*, 312 F.3d 645, 649 n.1 (4th Cir. 2002) (finding that it is appropriate for a district court to consider plaintiffs' Title VII and § 1981 claims together); *Bryant v. Bell Atl. Md., Inc.*, 288 F.3d 124, 133 n. 7 (4th Cir. 2002) (citing *Gairola v. Commonwealth of Va. Dep't of Gen. Servs.*, 753 F.2d 1281, 1285-86 (4th Cir. 1985)). Luallen and Ntuen cite the same allegations and evidence in support of their Title VII claims as was put forth in support of their § 1981 claims. Since the evidentiary burdens under each statute are identical, Luallen and Ntuen cannot succeed on their Title VII claims for the reasons outlined in the previous discussion of their § 1981 claims. As such, the court will grant Defendants' motion for summary judgment as to Luallen's and Ntuen's Title VII claims.

5. Claims under Title VI

Plaintiffs all allege that their treatment by GHCC violated Title VI. Title VI provides that "[n]o person . . . shall, on the

10. Plaintiffs alleging violations of Title VII must first exhaust administrative remedies by filing with the Equal Employment Opportunity Commission and receiving a right-to-sue letter, a requirement not imposed in § 1981 cases. *See Smith v. First Union Nat'l Bank*, 202 F.3d 234, 247 (4th Cir.2000). Both Luallen and Ntuen completed that condition and are thus able to bring Title VII claims in addition to their § 1981 claims.

ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance ." 42 U.S.C. § 2000d. However, Title VI only provides a cause of action in employment disputes when "a primary objective of the Federal financial assistance is to provide employment." *Id.* § 2000d-3. As such, "there is no 'judicial remedy for employment discrimination by institutions receiving federal funds unless ... providing employment is a primary objective of the federal aid.'" *Barbero v. Catawba Valley Legal Servs., Inc.*, No. 4:94CV115, 1995 WL 757738, at *3 (W.D.N.C. Sept. 21, 1995) (quoting *Trageser v. Libbie Rehab. Ctr., Inc.*, 590 F.2d 87, 89 (4th Cir. 1978), *overruled on other grounds by Consolidated Rail Corp. v. Darrone*, 465 U.S. 624, 628-31, 104 S. Ct. 1248, 1251-53 (1984)); *see Allen v. College of William & Mary*, 245 F. Supp. 2d 777, 785 (E.D. Va. 2003).

GHCC asserts that it receives federal funds only in the form of Medicare and Medicaid and receives no federal funding for the purpose of employing individuals. (Snuggs Aff. ¶ 3-6.) Plaintiffs do not dispute this contention.[11] When a plaintiff fails to show any evidence that a defendant receives federal funds for employment purposes, a Title VI claim cannot be sustained. *See Ingram v. Morgan State Univ.*, No. 95-2314, 1996 WL 13861, at *1 (4th Cir. Jan. 16, 1996)

11. Since the court has stricken Plaintiffs' response, they failed to respond to this allegation as a procedural matter. However, as noted herein, the court has reviewed Plaintiffs' response and accompanying evidence and finds that neither source offered any fact or argument to dispute Defendants' assertion that GHCC does not receive federal funds for employment purposes.

(upholding dismissal of Title VI claim when plaintiff failed to show employer used federal funds primarily for employment purposes or that she was the intended beneficiary of such assistance); *Grimes v. Superior Home Health Care of Middle Tenn., Inc.*, 929 F. Supp. 1088, 1094 (M.D. Tenn. 1996) (dismissing plaintiff's Title VI claim when defendant did not use federal funds primarily for employment purposes); *Vuciecevic v. MacNeal Mem'l Hosp.*, 572 F. Supp. 1424, 1430 (N.D. Ill. 1983) (same). As a result, the court will grant Defendants' motion for summary judgment as to Plaintiffs' Title VI claims.[12]

III. CONCLUSION

For the reasons set forth above, the court will grant Defendants' motion to strike. The court will also grant Defendants' motion for summary judgment.

An order and judgment in accordance with this memorandum opinion shall be filed contemporaneously herewith. The judgment shall not invalidate any prejudgment settlements that may be reached by the parties.

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12. Furthermore, as set forth above, Plaintiffs have failed to show any racially motivated discrimination or retaliation. Plaintiffs' Title VI claims would be defeated on those grounds, even if Plaintiffs had shown that GHCC received federal funds for employment purposes. *See Jane v. Bowman Gray Sch. of Med.-N.C. Baptist Hosp.*, 211 F. Supp. 2d 678, 690 (M.D.N.C. 2002) (concluding that Title VI claims are appropriately analyzed under the same standards as would be applied to Title VII claims); *Escobar v. Montgomery County Bd. of Educ.*, No. AW-99-1964, 2001 WL 98600, at *5 (D. Md. Feb.1, 2001) (same); *Love v. Duke Univ.*, 776 F. Supp. 1070, 1073 (M.D.N.C. 1991) (same).

Appendix C

ORDER AND JUDGMENT

For the reasons stated in the memorandum opinion filed contemporaneously herewith,

IT IS ORDERED AND ADJUDGED that Defendants' Motion to Strike Plaintiffs' Response [29] is granted.

IT IS FURTHER ORDERED AND ADJUDGED that Defendants' Motion for Summary Judgment [23] is granted. This judgment shall not invalidate prejudgment settlements that may be reached by Defendants and any one Plaintiff.

This the 18 day of December 2003

s/ [illegible]
United States District Judge

(2)

Supreme Court, U.S.
FILED
APR 25 2005
OFFICE OF THE CLERK

No. 04-1293

IN THE

Supreme Court of the United States

LOUISE E. LUALLEN,

Petitioner,

v.

GUILFORD HEALTH CARE CENTER, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether this Court should review the Fourth Circuit's fact-bound, one-paragraph affirmance of the District Court's grant of summary judgment to Respondents with respect to Petitioner's employment discrimination claims, particularly where the District Court struck Petitioner's evidence in opposition to summary judgment and Petitioner waived her right to appeal from this ruling.

RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, Guilford Healthcare Center, Inc., states that it has no parent corporations and that there are no publicly held companies that own more than 10% of its stock. Medical Facilities of North Carolina, Inc., states that it has no parent corporations and that there are no publicly held companies that own more than 10% of its stock.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
RULE 29.6 STATEMENT	ii
TABLE OF CONTENTS	iii
TABLE OF CITED AUTHORITIES	v
INTRODUCTION	1
STATEMENT OF THE CASE	1
REASONS FOR DENYING THE PETITION	4
A. Petitioner's Evidence Has Been Stricken And Petitioner Has Waived Her Right To Appeal That Decision	5
B. The Court of Appeals Correctly Affirmed The District Court's Finding That Petitioner Failed To Establish A *Prima Facie* Case Of Discrimination And Failed To Rebut Respondents' Legitimate Nondiscriminatory Reasons For Her Termination	6
C. The Court of Appeals Correctly Affirmed The District Court's Grant of Summary Judgment To Respondents On Petitioner's Retaliation Claim.	9

Contents

Page

D. The Petition Fails To Address Petitioner's Full Evidentiary Burden Under *McDonnell Douglas*. 10

CONCLUSION 11

TABLE OF CITED AUTHORITIES

Cases: *Page*

Bass v. E.I. Dupont De Nemours & Co., 324 F.3d 761 (4th Cir. 2003), *cert. denied*, 540 U.S. 940 (2003) 2

Beale v. Hardy, 769 F.2d 213 (4th Cir. 1985) 8

Bryant v. Aiken Regional Medical Centers, Inc., 333 F.3d 536 (4th Cir. 2003), *cert. denied*, 540 U.S. 1106 (2004) 6, 9

Bryant v. Bell Atlantic Maryland, Inc., 288 F.3d 124 (4th Cir. 2002) 6

Hines v. Hillside Children's Center, 73 F. Supp.2d 308 (W.D.N.Y. 1999) 6

Karpel v. Inova Health Care Sys. Services, 134 F.3d 1222 (4th Cir. 1998) 6

King v. Rumsfeld, 328 F.3d 145 (4th Cir. 2003), *cert. denied*, 540 U.S. 1073 (2003) 9

McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817 (1973) 6, 10, 11

McKiver v. G.E. Co., 11 F. Supp.2d 755 (M.D.N.C. 1997) 8

Cited Authorities

	Page
Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 120 S. Ct. 2097 (2000)	9
St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 113 S. Ct. 2742 (1993)	9
Statutes:	
42 U.S.C. § 1981	1, 2
42 U.S.C. § 2000d	2
42 U.S.C. § 2000e	2
Rules:	
Fed. R. App. P. 28(a)(9)(A)	4
Fed. R. Civ. P. 60(b)	3, 4, 5

I

INTRODUCTION

The question presented in the petition does not warrant review by this Court. Petitioner identifies no departure from the accepted and usual course of judicial proceedings on a summary judgment motion nor has she shown any compelling reason for review of this routine employment discrimination case. The record demonstrates that the District Court carefully considered the evidence and correctly found that Petitioner failed to establish a *prima facie* case of discrimination or retaliation, or offer evidence rebutting the legitimate, nondiscriminatory reasons proffered for Petitioner's termination. In a one paragraph *per curiam* opinion, the Fourth Circuit Court of Appeals affirmed the denial of Petitioner's claims on the reasoning of the District Court. Petitioner now attempts simply to re-argue the merits of her case, notwithstanding the fact that her evidence has been stricken, and she has waived her right to appeal the decision striking her evidence. Accordingly, the petition should be denied.

STATEMENT OF THE CASE

Respondent Guilford Healthcare Center, Inc. ("GHCC") provides long term residential health care for the elderly. Respondent Medical Facilities of North Carolina, Inc.[1] ("MFNC") is a management company providing administrative services to nine nursing home facilities in

[1] MFNC is not the parent company of GHCC and did not have an ownership interest in GHCC. Thus, MFNC was not Petitioner's employer for the purposes of § 1981, Title VI, or Title VII, and summary judgment was properly granted by the District Court. Petitioner did not appeal this issue to the Fourth Circuit and does not raise it in the petition.

North Carolina, including GHCC (collectively referred to herein as the "Respondents"). Petitioner Louise Luallen[2] ("Petitioner"), an African-American, filed this action against Respondents after being terminated by GHCC for multiple work rule violations, including insubordination, failure to take call, open defiance of a supervisor's instruction, conduct harmful to GHCC, its residents, and associates, and abusive language. Pet. App. 24a. Petitioner sought damages for alleged racial discrimination and retaliation by Respondents under 42 U.S.C. § 1981, 42 U.S.C. § 2000c (Title VII) and 42 U.S.C. § 2000d (Title VI).[3] *Id.* at 8a.

On September 5, 2003, Respondents moved for summary judgment with respect to all of Petitioner's claims.[4] Pet. App. at 10a. On October 1, 2003, Petitioner filed an untimely response in opposition to Respondents' motion for summary judgment. *Id.* Respondents moved to strike Petitioner's response to the motion for summary judgment. *Id.* On December 18, 2003, United States District Judge William J. Osteen granted Respondents' motion for summary judgment and motion to strike Petitioner's response. *Id.* at 31a. Although the District Court granted Respondents' motion to

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[2] In addition to Luallen, five other plaintiffs participated in the action in the District Court. None of the other plaintiffs in the action below are involved in the petition.

[3] Petitioner did not appeal the dismissal of her Title VI claim to the Court of Appeals.

[4] Although Petitioner mentions a "hostile environment" on page 5 of the petition, Petitioner did not plead a hostile work environment claim in the complaint. As such, Petitioner cannot argue such a claim now. *See Bass v. E.I. Dupont De Nemours & Co.*, 324 F.3d 761, 764–65 (4th Cir.), *cert. denied*, 124 S. Ct. 301 (2003).

strike, the District Court demonstrated throughout its Memorandum Opinion that it considered the content of Petitioner's response before granting the motion for summary judgment. *Id.* at 13a, 15a, 16a, & 29a.

With regard to Petitioner's discrimination claims, the District Court found that, even when the evidence was viewed in the light most favorable to her, Petitioner had failed to establish multiple elements of her *prima facie* case. The District Court found that she could not show that her job performance was satisfactory or that employees who were not members of the protected class were treated differently. Pet. App. 19a-20a. The District Court also found that many of the litany of the incidents complained of by Petitioner did not constitute adverse employment actions. *Id.* at 18a-19a. Furthermore, the District Court found that, even if it had not stricken her response, Petitioner failed to offer evidence, other than her own self-serving allegations, to rebut the legitimate non-discriminatory reasons proffered for her termination. *Id.* at 21a-22a.

With regard to her retaliation claim, the District Court found that Petitioner failed to produce evidence of a causal relationship between her participation in a protected activity and her termination, or evidence rebutting the legitimate, nondiscriminatory reasons proffered by Respondents. Pet. App. 23a-25a.

Petitioner moved, under Rule 60(b), to vacate the Order and Judgment entered by the District Court, arguing that the judgment should be set aside because the delay in responding to the motion for summary judgment was not attributable to Ms. Luallen. Pet. App. 5a. On June 14, 2004, the District Court denied Petitioner's motion to vacate, noting again that it considered the merits of the case and the evidence in support of Petitioner's response in reaching its decision.

Id. at 6a. Petitioner appealed both rulings to the Fourth Circuit Court of Appeals. On November 24, 2004, the Court of Appeals affirmed the District Court *per curiam*. *Id.* at 3a. In its one paragraph opinion, the Court of Appeals noted that Petitioner waived her right to appeal the District Court's denial of her Rule 60(b) motion by failing to comply with Fed. R. App. P. 28(a)(9)(A). *Id.*

REASONS FOR DENYING THE PETITION

The petition fails to provide any justification for this Court to review the question presented. First, Petitioner ignores the fact that her evidence has been stricken and that she has waived her right to appeal that decision. Second, although Petitioner asserts that the Court of Appeals sanctioned a departure by the District Court from the accepted and usual course of judicial proceedings on a summary judgment motion, the record demonstrates that the District Court carefully considered the merits of Petitioner's case, as well as her stricken evidence, and correctly entered judgment in favor of Respondents. Petitioner failed to establish a *prima facie* case of discrimination or retaliation, or offer evidence that the reasons given for Petitioner's termination were a pretext for discrimination. Third, the petition entirely fails to address the District Court's determination that Petitioner failed to rebut Respondents' proffered reasons for her termination or point to any evidence that could show these reasons to be pretextual.

For these reasons, as explained more fully below, the petition should be denied.

A. Petitioner's Evidence Has Been Stricken And Petitioner Has Waived Her Right To Appeal That Decision

As stated above, the District Court struck Petitioner's untimely response in opposition to Respondents' motion for summary judgment and any documents supporting the response. Pet. App. 31a. After the District Court granted summary judgment to Respondents, Petitioner moved to vacate the Court's order, under Rule 60(b), arguing that her response should not have been stricken because the neglect was attributable to her attorney. *Id.* at 5a. Petitioner's Rule 60(b) motion was denied. On appeal, the Fourth Circuit held that Petitioner had waived her right to appeal this denial. *Id.* at 3a. Accordingly, the record should not contain any of Petitioner's evidence, and Petitioner has no right to appeal the decision striking this evidence.

Once Petitioner's evidence was stricken, the District Court could have immediately granted Respondents' motion for summary judgment as uncontested. Pet. App. 13a, n.1. Nevertheless, as discussed below, the Court went beyond its obligation and considered the merits of the case, even considering Petitioner's stricken response. As such, Petitioner cannot show that the Court of Appeals sanctioned a departure by the District Court from the accepted and usual course of judicial proceedings on a summary judgment motion.

B. The Court of Appeals Correctly Affirmed The District Court's Finding That Petitioner Failed To Establish A *Prima Facie* Case Of Discrimination And Failed To Rebut Respondents' Legitimate Non-Discriminatory Reasons For Her Termination

Having no direct evidence of discrimination, Petitioner was required to prove her claims through the disparate treatment framework of proof developed in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817 (1973). Under this framework, a plaintiff may establish a *prima facie* case of discrimination by showing: (1) membership in a protected class; (2) qualification for her position and satisfactory performance; (3) an adverse employment action; and, (4) different treatment of similarly situated employees outside the protected class. *McDonnell Douglas*, 411 U.S. at 802; *see also Bryant v. Bell Atlantic Maryland, Inc.*, 288 F.3d 124, 133 (4th Cir. 2002); *Karpel v. Inova Health Care Sys. Services*, 134 F.3d 1222, 1228 (4th Cir. 1998). If the plaintiff establishes a *prima facie* case, the defendant then must articulate a legitimate, nondiscriminatory reason for the challenged employment action. *McDonnell Douglas*, 411 U.S. at 802; *Bryant*, 288 F.3d at 133. The plaintiff is then required to show that the proffered reason was a pretext for unlawful discrimination. *McDonnell Douglas*, 411 U.S. at 804; *Bryant*, 288 F.3d at 133.

The District Court found that Petitioner had not established all of the elements of a *prima facie* case of discrimination. Petitioner did not produce evidence that her performance was satisfactory. Pet. App. 19a-20a. Petitioner's reliance on past performance appraisals is unfounded. *See Hines v. Hillside Children's Center*, 73 F. Supp.2d 308, 315 (W.D.N.Y. 1999). In fact, the evidence is uncontroverted that Petitioner was not performing her job satisfactorily and was terminated for her own misconduct. Petitioner attempts

to sidestep this issue in the petition, arguing, erroneously, that she should not have been terminated for a single "no-call" violation.[5] Pet. 4. However, the undisputed evidence shows that Petitioner was not terminated simply for failing to take call, but rather for a pattern of misconduct including "insubordination, open defiance or disregard of a supervisor's instruction . . . failure to follow procedures of critical importance to [her] job . . . conduct which is harmful to [GHCC], its residents, families, associates, vendors or others . . . abusive, disruptive or offensive language or actions . . . [and] failure to exhibit customer service." Pet. App. 24a. Furthermore, Petitioner's statement that "[n]o one is terminated for first refusal by rule" is factually incorrect. Pet. 4. The evidence shows that GHCC has no such rule or policy and that her termination was consistent with its policies.

Petitioner also failed to establish that employees outside of her protected class were treated differently. Contrary to her assertions, Petitioner produced no competent evidence demonstrating that white employees were treated differently with regard to discipline and job support. The petition erroneously states that a white nurse was not discharged for failing to take call. Pet. 4. In fact, the uncontroverted evidence establishes that a white male nurse, Scott Hoops, was terminated after he failed to take call. Petitioner was not Hoops' supervisor nor does she have personal knowledge of

[5] Nurses at GHCC were required to be on-call for one week, running from Monday to Monday, several times a year. Nurses were paid extra for each week they were on-call. The on-call nurse was required to carry a pager and had to respond to pages within 15 minutes. If GHCC had a staffing shortage due to a call-out and could not find either a volunteer to cover the shift, GHCC would page the on-call nurse to come in as a last resort.

the events leading to his termination or later rehiring. Petitioner's own unsupported assertions regarding Mr. Hoops are insufficient to support her claim that she was treated differently. *See McKiver v. G.E. Co.*, 11 F. Supp.2d 755, 759 (M.D.N.C. 1997). The other individual mentioned by Petitioner, Brenda Smith, is also African-American and thus could not serve as a similarly-situated comparator *outside* the protected class. The District Court correctly found that Petitioner had not produced any evidence to show that other nurses outside the protected class engaged in the same pattern of misconduct as Petitioner. Pet. App. 24a. Petitioner thus failed to establish all of the elements of a *prima facie* case of discrimination.

Even if Petitioner had established her *prima facie* case, the Court of Appeals correctly affirmed the District Court's finding that Petitioner produced no competent evidence to rebut the legitimate, nondiscriminatory reasons Respondents proffered for her termination. Pet. App. 21a-22a. Petitioner's evidence, which the District Court struck, consisted only of "self-serving allegations and conclusions." *Id.* The District Court correctly stated that "mere speculation as to an employer's discriminatory motive is insufficient to survive a summary judgment motion. *Id.* (citing *Beale v. Hardy*, 769 F.2d 213, 214 (4th Cir. 1985)).

C. The Court of Appeals Correctly Affirmed The District Court's Grant of Summary Judgment To Respondents On Petitioner's Retaliation Claim.

A plaintiff lacking direct evidence of retaliation must produce evidence showing that: (1) she engaged in protected activity; (2) the employer took adverse employment action against her; and (3) a causal connection existed between the first two elements. *King v. Rumsfeld*, 328 F.3d 145, 151 (4th Cir. 2003). If the plaintiff establishes her *prima facie* case, the burden of production shifts to the employer to articulate a legitimate, non-discriminatory reason for its actions, which, if believed by the trier of fact, would support a finding that illegal retaliation did not cause the allegedly adverse employment actions. *Bryant v. Aiken Regional Medical Centers, Inc.*, 333 F.3d 536, 543 (4th Cir. 2003). Once the employer meets its burden of production, the presumption raised by the *prima facie* case "drops out of the picture" and the burden shifts back to the plaintiff to show that the employer's stated reason was merely a pretext for discrimination. *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 120 S. Ct. 2097, *citing St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502 (1993).

The petition misstates numerous facts regarding this claim. First, the petition mischaracterizes the nature of the concerns raised at the employee meetings. Pet. 2. Second, the petition incorrectly claims that Respondents did nothing to address the concerns raised at these meetings. *Id.* The uncontroverted evidence demonstrates that Respondents addressed concerns, scheduled additional meetings, and adopted recommendations of the participants. Third, the petition erroneously states that Petitioner engaged in

protected activities as late as June. *Id.* at 6. In fact, it is undisputed that the last alleged protected activity occurred in April, 2001.

The District Court found that Petitioner failed to establish the third element of her *prima facie* case in that she could not show a causal connection between the protected activities, in this case two employee meetings, and her termination. Pet. App. 25a. Contrary to Petitioner's assertions, the uncontroverted evidence demonstrates that she was not terminated after a series of mistreatments, but rather, was terminated because of her own misconduct. The Court also found that Petitioner failed to show that any of Respondents' reasons for her termination were a pretext for discrimination. *Id.* Petitioner again attempts to rely on her erroneous allegation that she was fired simply for failing to take call and her unsupported claim that employees outside of her protected class were treated differently. As discussed above, the record demonstrates that Petitioner was fired for multiple rule violations and was unable to identify any similarly-situated individuals who were treated differently. As such, the Court of Appeals did not sanction a departure by the District Court from the accepted and usual course of judicial proceedings when it affirmed the denial of Petitioner's retaliation claim.

D. The Petition Fails To Address Petitioner's Full Evidentiary Burden Under *McDonnell Douglas.*

With regard to both her discrimination and retaliation claims, Petitioner's argument is focused entirely on the District Court's analysis of her *prima facie* case. *See* Pet. 4-7. The petition fails to confront the District Court's determination that Petitioner failed to rebut Respondents'

proffered reasons for her termination or point to any evidence that could show these reasons to be pretextual. Furthermore, any evidence that Petitioner might point to has been struck.

As such, even if Petitioner could demonstrate that the District Court incorrectly determined that she failed to establish her *prima facie* case, and thus arguably departed from the accepted course of judicial proceedings on a summary judgment motion, the petition is futile. The petition ignores the second half of Petitioner's evidentiary burden under *McDonnell Douglas*. Furthermore, Petitioner has waived any appeal of the ruling striking all evidence that could conceivably meet this burden. Accordingly, the petition should be denied.

CONCLUSION

For the foregoing reasons, the petition does not present any issues requiring this Court's review. Accordingly, the petition should be denied.

Respectfully submitted,

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